Supreme Court, U.S.
FILED
MAY 4 1987
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 86-1206

IN THE

Supreme Court of the United States

October Term, 1986

BENJAMIN WILLIAMS,

Petitioner,

v.

STATE OF ARKANSAS,

Respondent.

PETITIONER'S REPLY BRIEF

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TABLE OF CONTENTS

Table of Contents 1

Table of Authorities 2

Argument 3

Conclusion 7

TABLE OF AUTHORITIES

Cases:

Oregon v. Kennedy, 456 U.S. 667 (1982) 5,6

United States v. Dinitz, 424 U.S. 600 (1976) 5,6

Williams and Wallace v. State, No. CR84-418 (Aug. 27, 1984) 4

Woods v. State, 287 Ark. 212, 697 S.W. 2d 890 (1985) 4,5,6

Constitutional Provisions and Statutes:

Fifth Amendment, U.S. Constitution *passim*

Ark.Stat.Ann. § 41-106 5,6

A R G U M E N T

The State mischaracterizes petitioner's argument as not properly before the court. Quite to the contrary, it is properly before the Court because the Fifth Amendment double jeopardy claim has been raised at every point in this case since the issue arose.

A. We omitted to mention in our Petition for Writ of Certiorari a procedural step, which, while not critical to the merits of the case, demonstrates that the issue has been properly raised.

Prior to the August 27, 1984 trial and the denial of the motion to dismiss for double jeopardy, petitioner and co-defendant Wallace sought a temporary stay from the Arkansas Supreme Court by writ of prohibition raising the Fifth Amendment argument. The Arkansas Court "denied [the writ] for want of a record showing the proceedings that occurred when a continuance was

assertedly granted by the trial court on April 23, 1984. This ruling is without prejudice to the petitioner's [sic] right to raise the issue on appeal."[1] *Williams and Wallace v. State*, No. CR 84-148 (Aug. 27, 1984) (bracketed material added). The Petition for Writ of Prohibition clearly raised Fifth Amendment double jeopardy as a bar to retrial.

On denial of the writ, the double jeopardy motion was immediately reasserted in the Clark County Circuit Court (filed Aug. 27, 1984). That motion was denied and the jury trial proceeded to the point of the mistrial which is at issue here.

B. When the Arkansas Supreme Court decided the case on the appeal of the denial of the double jeopardy plea, it completely ignored the Fifth Amendment argument raised by the appellants and decided the case on statutory grounds finding that the peti-

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[1] Which they did and lost.

tioners consented to a mistrial by moving for it. *See* Ark.Stat.Ann. § 41-106(3) and *Commentary* quoted in *Woods v. State*, 287 Ark. 212, 214, 697 S.W. 2d 890, 891 (1985).

The constitutional challenge was thus preserved for review.

C. *Oregon v. Kennedy*, 456 U.S. 667 (1982), was not cited below by either side to either case (petitioner's and Wallace's or Woods'). The appellants below cited *United States v. Dinitz*, 424 U.S. 600 (1976):

> The double jeopardy clause does protect an accused against governmental actions intended to provoke mistrial requests and bars retrial where there is "bad faith conduct by judge or prosecutor." *Dinitz, supra*, [96 S.Ct.] at 1081.

Appellant's Brief in *Woods v. State* (filed July 10, 1985) at 30. It was further argued that the sole purpose of the continuance was to cut off an appellate argument on the State's discovery failure which would have resulted in reversal and, *citing Dinitz*, that the continuance was calculated

to give the State a more favorable opportunity to convict on retrial. *Id.* at 31. Thus, it was argued, the double jeopardy clause of the Fifth Amendment barred retrial. *Id.* at 32.[2]

The State's response was simply that a construction of § 41-106 did not bar retrial, and it never addressed the Fifth Amendment argument. The State should have cited *Kennedy* below but did not.

D. If petitioner argued here that *Dinitz* and its line of cases barred retrial witout citing *Kennedy*, that would have been poor lawyering not to anticipate and frame the issue properly, and the State would have responded requesting that the Petition be denied merely citing *Kennedy*.

By our citing Kennedy and addressing this issue head-on, an issue that they declined to raise below in defense of the

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[2] After *Woods* was decided, petitioner and Wallace conceded law of the case applied to their argument.

judgment appealed from, which necessarily has to be addressed by petitioner in this court, the State argues the issue is not properly before the court. In other words, because the State and Arkansas Supreme Court closed their eyes to the constitutional issue below, this court should too.

The issue raised in the Petition needs to be resolved by this Court, and the State cannot make it go away.

C O N C L U S I O N

The Fifth Amendment double jeopardy issue is properly before this Court, and it was properly before the Arkansas Supreme Court. The Petition for Writ of Certiorari to the Arkansas Supreme Court should thus be granted.

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